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**Back to the Future of Postloss Insurance Conditions in Nebraska:  
*German Insurance Co. v. Fairbank*, 32 Neb. 750, 49 N.W. 711  
(1891)**

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Back to the Future of Postloss  
Insurance Conditions in Nebraska:  
*German Insurance Co. v.*  
*Fairbank*, 32 Neb. 750, 49 N.W.  
711 (1891)

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I. INTRODUCTION

On the twelfth day of January, 1888, in Adams County, Nebraska, Loren Fairbank's cow was driven by wind onto a barbed wire fence, where it soon expired. Fairbank presented a claim to the German Insurance Company under a property insurance policy in which the insurer promised to indemnify Fairbank up to various policy limits for loss to (among other things) cattle, caused by (among other perils) windstorms. There was no dispute about the cause of Fairbank's loss

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or the amount of his claim. Nonetheless, the insurer refused to pay on the grounds that Fairbank had failed to satisfy several express conditions spelled out in the policy. The district court entered judgment for Fairbank. On appeal, the Supreme Court of Nebraska reversed.<sup>1</sup> Two of the alleged failures of condition were not enough to bar recovery; however, Fairbank's failure to prove that he had satisfied the third, a postloss condition requiring timely proofs of loss, was fatal to his claim.

Of course, there is more to the story than appears on the face of the *Nebraska Reports*. The wind that strained both Fairbank's cow and Fairbank's relations with his insurer was no ordinary wind, but part of the "School Children's Blizzard" of 1888,<sup>2</sup> a storm credited with working permanent changes in the nature of the cattle industry throughout the plains, immigration and emigration patterns, and even the design and siting of school buildings. And District Judge William Gaslin was no ordinary judge; in a sixteen-year judicial career in a district that encompassed more than half of Nebraska, this "great judge . . . noted for short-cut justice"<sup>3</sup> presided over sixty-eight murder trials with a flair that made him something of a folk hero and frequently put him at odds with the supreme court and many of the lawyers and litigants who appeared before him.<sup>4</sup> And 1891 was no ordinary year for the Nebraska Supreme Court; while the *Fairbank* case was pending, the court was dragged into the vortex of the Populist "Political and Social Revolution of 1890," forced to become involved in the decision of who would be governor while under threat of arrest by roaming militia if its decision went the wrong way!<sup>5</sup> And . . .

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1. *German Ins. Co. v. Fairbank*, 32 Neb. 750, 49 N.W. 711 (1891).
  2. For a summary discussion of the "peculiar historical and social significance" of the storm, see Clement, *The Blizzard of 1888*, in *ROUNDUP: A NEBRASKA READER* 263, 265 (V. Faulkner ed. 1957). For an extended treatment, see W. O'GARA, *IN ALL ITS FURY* (1935). For a different—but equally evocative—effort, see Reynal, *The Blizzard of '88* (mural in the foyer of the Nebraska State Capitol).
  3. *Judge Gaslin Stories*, 4 NEB. HIST. 44, 45 (1921).
  4. Judge Gaslin was the judge who sentenced Print Olive to life imprisonment. See, e.g., Osborne, *The Olive Trial*, in D. CREIGH, *ADAMS COUNTY: A STORY OF THE GREAT PLAINS* 474 (1972); M. SANDOZ, *THE CATTLEMEN* 188-201 (1958). Gaslin was the judge whose reaction to finding two men he had sentenced to hang dangling from vigilante ropes was widely reputed to have been: "There is one case that the Supreme Court will not reverse." J. HASKELL, *JUDGE WILLIAM GASLIN: NEBRASKA JURIST* 41 (1983). And he was the judge who reacted to plans to increase the number of district judges with a broadside delivered to the Nebraska State Historical Society meekly entitled "Judicial Graft." Gaslin, *Judicial Graft*, reprinted in J. HASKELL, *supra*, at 86-94. See generally Cordeau, *William Gaslin*, 4 NEB. L. BULL. 300 (1926); Thompson, *Reminiscences of Judge Gaslin*, 4 NEB. L. BULL. 305 (1926).
  5. *State ex rel. Benton v. Elder*, 31 Neb. 169, 47 N.W. 710 (1891) (Speaker of House obligated to open and publish election returns); *State ex rel. Thayer v. Boyd*, 31 Neb. 682, 48 N.W. 739 (1891) (elected governor ineligible to serve), *rev'd*, *Boyd v.*

Still, however extraordinary the times and some of the participants, a lawyer schooled in the insurance law of the period would have seen little noteworthy in the court's treatment of the failures of condition alleged in *Fairbank*. Forty-two years would pass before the *Nebraska Law Bulletin* would begin publishing casenotes,<sup>6</sup> but even had the *Nebraska Law Review* been positioned in 1891 "to highlight new developments in the law and convey the significance of those developments,"<sup>7</sup> *Fairbank* almost certainly would not have made the cut. *Fairbank's* cow was not an unexpectedly fecund Rose of Aberlone<sup>8</sup> and *Fairbank* did not give birth to a new line of insurance law. Both the cow, and the law applied to her, were ordinary: she was not beaten to death by her owner,<sup>9</sup> nor was she hit by lightning while sojourning in the wrong pasture,<sup>10</sup> nor was she killed through the cumulative effects of covered "wind" and excluded "water"<sup>11</sup>—each a route to legal immortality taken by a bovine or equine progenitor of Nebraska insurance law.

Why, then, treat *Fairbank* as noteworthy today, even in an issue of the *Nebraska Law Review* celebrating the centennial of the College of Law? A lawyer reading the *Fairbank* opinion in conjunction with the Nebraska Supreme Court's most recent ventures into the world of

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Nebraska ex rel. Thayer, 143 U.S. 135 (1892). The story of the election contests is succinctly recounted in Nelson, *Amasa Cobb*, 14 NEB. L. BULL. 197, 206-09 (1936). For a more in-depth treatment, see 1 A. SHELDON, NEBRASKA: THE LAND AND THE PEOPLE 696-702 (1931).

6. Volumes 1 and 2 of the NEBRASKA LAW BULLETIN were published by the College of Law in 1922 and 1923, and were devoted exclusively to extensive essays on selected areas of Nebraska law, prepared by members of the faculty. By 1924, the NEBRASKA LAW BULLETIN had become an "Official Organ of the Nebraska State Bar Association" and the University of Nebraska Section began to include notes on "Recent Cases." The formal announcement of this development came with the Report of the Committee on Legal Education, 3 NEB. L. BULL. 42-43 (1924), and Professor Henry Foster's response, *id.* at 43-44. Case comments were to be prepared "by the student editors with the advise and assistance of the faculty editor and in some instances by the faculty editor alone." 3 NEB. L. BULL. 259 (1924). The NEBRASKA LAW BULLETIN became the NEBRASKA LAW REVIEW in 1941.
7. The "purpose of a casenote," according to NEBRASKA LAW REVIEW, WRITING A NOTE (c. 1990).
8. See *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887) (mistake in fundamental assumption ground for rescission).
9. See *Western Horse & Cattle Ins. Co. v. O'Neill*, 21 Neb. 548, 32 N.W. 581 (1887) (implied exception from coverage where insured horse beaten to death by its owner). See also *Western Horse & Cattle Ins. Co. v. Timm*, 23 Neb. 526, 37 N.W. 308 (1888) (implied exception if mules worked to death while plowing).
10. See *Johnson v. Caledonian Ins. Co.*, 125 Neb. 759, 251 N.W. 821 (1933) (location of horse contributed to its death by lightning). See also *Waters v. Nebraska Mut. Ins. Co.*, 108 Neb. 1, 187 N.W. 125 (1922) (location clause construed to be affirmative warranty).
11. See *Lydick v. Insurance Co. of N. Am.*, 187 Neb. 97, 187 N.W.2d 602 (1971) (exclusion of damage caused by water construed to be purging condition).

postloss insurance conditions—in the *First Security* cases<sup>12</sup>—likely would conclude that little of legal significance had changed. True, quite different sorts of oxen were being gored by quite different sorts of ill winds, but the failure to file timely proofs of loss apparently was as fatal to the *First Security* claims as it had been to the *Fairbank* claim, and apparently for the same reasons. And therein lies our tale. What makes *Fairbank* noteworthy today is that its treatment of postloss insurance conditions looks so normal—so unnoteworthy—to modern eyes, despite a century of change in both insurance practice and insurance law, and increasing ferment concerning the appropriate treatment of postloss conditions.

A retrospective peek beneath the formal veneer of the *Fairbank* opinion is a useful reminder that appellate opinions necessarily tell only a part of the story. Omitted details—that Loren Fairbank was one of the last “entrymen” to homestead the rolling farmland of Verona Township,<sup>13</sup> that the boom years for land speculators and commercial developers that preceded the School Children’s Blizzard mostly bypassed the farming community,<sup>14</sup> that the lawyer who represented Fairbank was one of Juniata’s principal property insurance agents,<sup>15</sup> that the constable charged a nickel for service of process in the justice court proceeding<sup>16</sup>—may well evoke a fuller appreciation of the historic, economic, social, and human dimensions of the story, but as lawyers we are conditioned by our training and by the practical demands of our discipline to limit ourselves in our professional roles to the formal “legal” history of the dispute. And so it should be. Abstraction and taxonomy and analogy are at the essence of law and

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12. The *First Security* cases were part of the fallout from the failure of Commonwealth Savings. *First Security Savings v. Kansas Bankers Surety Co.*, 849 F.2d 345 (8th Cir. 1988), held that losses sustained by the insured financial institutions as a result of illegal loans were not covered by “discovery” bonds written by the defendant insurer because the losses were discovered *before* April, 1983, when the bonds became effective. In *First Sec. Bank & Trust v. New Hampshire Ins. Co.*, 232 Neb. 493, 441 N.W.2d 188 (1989), and *First Sec. Sav. v. Aetna Casualty & Sur. Co.*, 233 Neb. 335, 445 N.W.2d 596 (1989), efforts to recover against the insurers who had written bonds for the period prior to April, 1983, also proved unavailing, because (1) discovery had occurred *after* April, 1983, and thus after the bonds expired; and (2) proofs of loss had not been submitted in timely fashion.

13. 1 PAST & PRESENT OF ADAMS COUNTY, NEBRASKA 459 (W. Burton & D. Lewis, eds. 1916).

14. See generally D. CREIGH, *supra* note 4, at 19-36; J. OLSON, HISTORY OF NEBRASKA ch. 17 (1955); A. SHELDON, *supra* note 5, at ch. XIX.

15. Juniata Herald, January 19, 1888.

16. Transcript at 2, *Fairbank v. German Ins. Co.* (Justice Ct., Sept. 27, 1888). “Justice Fees” totaled \$2.90: “Docketing and Summons” = \$.75; “2 Filings” = .20; “Copying Return Officer” = .10; “Entering Judgment” = .50; “Oath to Witness” = .10; “This Transcript” = \$1.00; “Certificate” = .25. “Constables Fees” totalled \$.80: “Service and Return” = .50; “Copy” = .25; “Mileage” = .05.

lawyering.<sup>17</sup> Unfortunately, the habit of suppressing details of time and place sometimes deadens recognition of significant differences of time and place. We end up classifying *Fairbank* and the *First Security* decisions together as validations of the same immutable, timeless rule; the headnotes that determine how these appellate decisions appear in the digests might as well be identical.<sup>18</sup> And that's a shame. It's a shame because appellate opinions, too, are located in time and place, and the meanings we ascribe to them should at least take these differences into account.<sup>19</sup> It should matter that *Fairbank* was decided one hundred years ago, not because we need to understand the story whole, but because viewing appellate opinions ahistorically not only can get in the way of understanding their historical, social, and human dimensions, but also can impede our understanding of the legal story as well.<sup>20</sup>

Of course. As lawyers we understand the difference between *Fairbank* and *Fairbank*, and we understand as well the distinctive ways appellate opinions provide continuity between their pasts, present,

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17. Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 57 (1981): "Analogy and precedent are the stuff of law because they are the only form of reasoning left to the law when general philosophical structures and deductive reasoning give out, overwhelmed by the mass of particular details." Compare Wonnell, *The Abstract Character of Contract Law*, 22 CONN. L. REV. 437 (1990) (normative indispensability of abstract principles) with L. FRIEDMAN, *CONTRACT LAW IN AMERICA* 20-21, 97-98, 122-24, 189-91 (1965) (abstraction as historical contingency of progressively limited importance). See generally E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1948).

18. *German Ins. Co. v. Fairbank*, 32 Neb. 750, 49 N.W. 711, headnote 4 (1891):

In an action upon the policy which provides that the insured should furnish proofs of loss within a specified time after the loss occurred, it is necessary for the plaintiff to prove upon the trial that the proofs were made, or that the same were waived by the company.

*First Sec. Sav. v. Aetna Casualty & Sur. Co.*, 233 Neb. 325, 445 N.W.2d 596, headnote 1 (1989):

In order for an insured to recover under a discovery bankers blanket bond, the insured must establish that it . . . furnished the underwriter proof of loss with full particulars within the time specified by the bond.

19. In the first-year law curriculum, . . . cases are normally treated like doctrinal fruits on a conceptual tree: some bulk large, some are almost insignificant; some display a wondrous perfection of development, others are shown to be rotten at the core; some are further out along conceptual branches than others; but all are quite erroneously treated as though they blossomed at the same time, and for the same harvest.

Danzig, *Hadley v. Bazendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975). See also L. FRIEDMAN, *supra* note 17, at 3-11.

20. See White, *The Appellate Opinion as Historical Source Material*, 1 J. INTERDISCIPLINARY HIST. 491 (1971) [hereinafter White, *The Appellate Opinion*]. See also White, *Book Review*, 59 VA. L. REV. 1130, 1135-36 (1973):

These pieces of information do more than satisfy an antiquarian curiosity. They provide us with antecedent reference points to which the law, in its process of change, is continually recurring and thereby help to explain its anomalies and irregularities.

and futures.<sup>21</sup> But does a retrospective look at *Fairbank* in its historical setting offer anything besides a chance to dust off old manuscripts, polish old verities about the uses of legal authority, and test the limits of the *Law Review's* traditional insistence that noted cases be "current"? Indeed, it does.

Several years ago, in the course of a survey of Nebraska property and liability insurance law,<sup>22</sup> I noted the Nebraska Supreme Court's occasional use of what appeared to be a new "prejudice rule" for at least some postloss insurance conditions—a potentially significant deviation from the contracts orthodoxy that classifies most insurance policy provisions as express conditions and, except where statutes have altered things, subject to the common law rule that "express conditions, whatever their nature, must under any and all circumstances be literally performed"<sup>23</sup>—and wondered why in Nebraska it had supplanted the strict common law rule for some failures of postloss conditions and not for others. More recently, in the course of the *First Security* litigation, three major Nebraska law firms devoted over 140 pages of appellate briefs to debating whether a prejudice rule or the strict common law rule should apply to failures to satisfy postloss conditions in surety bonds.<sup>24</sup> In these discussions, the prejudice rule appears as an alien form of legal growth, its seeds blown into Nebraska from other jurisdictions, occasionally taking tentative root, but usually failing to compete successfully with the established indigenous common law rule. Viewing the prejudice rule that way is limiting; it leads to the legal equivalent of botanical surveys, faithfully recording the appearance of this new bit of legal flora, but leaving to others an explanation for why it has been able to establish a foothold one place and not another. This retrospective on *Fairbank* seeks to provide what those earlier efforts lack: an argument—this one<sup>25</sup> essentially historical in its structure and content—for why a prejudice rule might appro-

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21. See generally White, *The Appellate Opinion*, *supra* note 20. See also Hart & McNaughton, *Evidence & Inference in the Law*, 87 DAEDALUS 40, 41 (1958) ("At the moment of their making, they speak from the present to the future. At the moment of their application, they speak out of the past to the present.").

22. R. WORKS, NEBRASKA PROPERTY & LIABILITY INSURANCE LAW 83-91 (1985).

23. F. KESSLER & G. GILMORE, CONTRACTS CASES AND MATERIALS 845-46 (2d ed. 1970).

24. Brief of Appellant 16-48, *First Sec. Bank & Trust v. New Hampshire Ins. Co.*, 232 Neb. 493, 441 N.W.2d 188 (1989) (No. 89-176); Brief of Appellee 10-15, 21-50, *id.*; Reply Brief of Appellant 2-11, 16-22 *id.*; Brief of Appellant 18-50, *First Sec. Sav. v. Aetna Casualty & Sur. Co.*, 233 Neb. 335, 445 N.W.2d 596 (1989) (No. 87-897); Brief of Appellee 7-19, 24-27, *id.*; Reply Brief of Appellant 1-14, *id.*

25. Of course, other arguments are possible. For example, in other work in progress, I consider what light the neoinstitutionalist economic literature on "opportunism" might shed on these and related phenomena. For a useful introduction to that literature, see O. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985).

priately displace the orthodox common law rule for some failures of condition. By examining *Fairbank* in its historical setting, we may learn to recognize the prejudice rule for what it is, a reflowering of long-dormant but well-rooted traditions in Nebraska insurance law, and with that recognition to develop a sense of where it should be allowed to spread.

We begin in Part II with a look at the *Fairbank* decision, first through modern eyes undistracted by details of context, and then from a more proximate vantage, where things appear distinctly less clear. In the process of looking at the way the *Fairbank* court treats each of the three alleged failures of condition, we discover that *Fairbank* can appear ordinary from both perspectives, but for quite different reasons. From a hundred years away, with the false clarity that distance can bring, *Fairbank* can seem a simple application of the formal contracts orthodoxy that express conditions must be fully satisfied; up close and fuzzy, *Fairbank* appears to subvert that orthodoxy without directly confronting it.

Part III moves from discovery to explanation. Rather than treat *Fairbank*'s implicit subversions of the strict common law rule as aberrational lightning bolts from the judicial blue, it offers a broadly limned historical explanation for what we have learned of *Fairbank* and its context, an explanation that finds its explicative design in a recurring judicial and legislative concern with the overbreadth built into standard insurance policy forms designed to control juridical hazard. Part III then suggests how informing the prejudice rule with this content provides a limiting principle that can guide the determination of which policy provisions should be subject to a prejudice rule and which should not.

## II. THE FAIRBANK DECISION

The German Insurance Company's defense to Fairbank's claim was simple: it had promised to indemnify Fairbank for loss to his cow only if certain conditions were met, among them that Fairbank's insured property not have been mortgaged, that suit be brought within six months after the loss, and that proofs of loss be submitted within thirty days of the loss. According to the insurer, Fairbank failed to satisfy each of these conditions. The trial court disagreed, without explaining why.<sup>26</sup> The Nebraska Supreme Court reversed. Each of the three provisions established a condition precedent to the insurer's

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26. The suit was brought in Justice Court, Juniata Precinct. A default judgment was entered in favor of Fairbank. The insurer appealed to the district court; a trial *de novo* before Judge Gaslin produced a judgment for Fairbank in the amount of \$58.88 (\$30 principal amount of indemnity obligation under policy; \$2.50 interest; and \$26.38 in costs taxed by the district court). *Fairbank v. German Ins. Co.*, slip op. at 1, (D. Ct. Adams Co., May 24, 1889).



duty to pay. The record disclosed that the mortgage condition had been satisfied, and that the suit condition had been satisfied, but there was no indication that the proof of loss condition had been satisfied. Thus, it was error for the trial court to hold that the insurer was obligated to pay.

Viewed through standard-issue conceptual lenses ground in the modern insurance law fashion, the *Fairbank* decision hardly seems the stuff of which a law office history in support of a prejudice rule might be built. In *Fairbank*, as in the *First Security* decisions, we can see the court holding that the insured must lose because a proof of loss condition was not satisfied. Then, as now, the text of the opinion seems to be telling us that the only question for the court is whether conditions precedent to the insurer's obligation have been satisfied. Then, as now, there appears to be no room for inquiry into whether the insurer was in any way prejudiced by a failure of condition. Then as now, the simple mechanics of contracts conditions are treated as so transparent that the consequences of a failure of condition can go without saying: any noncompliance with a policy condition, no matter how trivial, should be enough to prevent the insurer's obligation from arising.<sup>27</sup>

But, of course, there is more to the story—more in the text of the opinion, and even more in its subtext and context—than that.

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27. H. WOOD, *WOOD ON FIRE INSURANCE* § 135, at 270 (1878), spelled out the conventional understanding:

All the provisions of a policy, relating to the risk, are conditions precedent, and, unless waived, must be strictly complied with, such as promissory warranties, or conditions relating to increase or alteration of risk; to the giving of notice, and presenting proofs of loss; the production of builders, citizens or magistrates certificate of loss; as to the giving notice of other insurance; and indeed, each and every condition of the policy must be fully and strictly performed, before an action can be maintained for a loss under the policy.

Insurance authorities traditionally have gone to considerable lengths to warn that warranties, whether or not cast in terms explicitly conditional, were to be treated as express conditions subject to the strict compliance requirement. As an early treatise writer put it:

A warranty in a policy of insurance is regarded as a condition; that is, as a stipulation upon the strict compliance or non-compliance with which the validity of the policy depends. No substantial compliance with the warranty, or performance of an equivalent act will avail the insured, or render the underwriters liable, if the express terms of the contract be infringed. It is immaterial whether the purpose intended by the warranty has been answered or not; whether the loss was attributable to a violation of the warranty, or to any other cause; . . . if the terms of the warranty be broken, the condition of the contract is violated, and the underwriters are consequently discharged.

D. HUGHES, *TREATISE ON THE LAW RELATING TO INSURANCE* 308 (1833).

## A. *Fairbank Redux*

### 1. *The Mortgage Condition*

The policy issued to Fairbank declared that "if the property or any part thereof . . . shall be incumbered by mortgage . . . this policy shall be absolutely void."<sup>28</sup> Fairbank executed a series of mortgages, some on the insured farm buildings, some on several insured horses, thus apparently violating the provision. However, the Nebraska Supreme Court concluded that the mortgages did not prevent recovery. The policy allocated the policy limit of \$1,150 among several internal limits: \$450 on the dwelling, household furniture, beds and bedding, wearing apparel and sewing machine; \$300 on horses and cattle, not exceeding \$100 on any one horse or \$30 on any one of the cattle; and \$400 on the other personalty. The court read the policy as though it contained separate insurer promises to indemnify for losses to each class of property, each with its own associated conditions.

The policy having specified separate and distinct amounts upon the different subjects of insurance, the contract is severable, and a breach of a condition of the policy against incumbrances could only affect that class of property which was covered by the incumbrance. The execution of the mortgages upon the lands therefore only avoided the policy so far as it covered the buildings, and did not in any manner affect the insurance upon the cattle.<sup>29</sup>

But Fairbank's mortgages were not limited to incumbrances on realty; in early 1887, Fairbank had granted a chattel mortgage to a local lender covering several head of horses. Could the policy be further divided, as between different species of livestock? Of course, said the court: "There is no claim that there had ever been any incumbrance during the life of the policy, upon the cow that was killed, or upon any of the cattle owned by the insured."<sup>30</sup> Thus, Fairbank's mortgages did not constitute a failure of condition precedent to the obligation of the insurer to indemnify for losses to cattle. Thus, there was no reason for the court even to discuss the consequences of a failure of a mortgage condition. Simple enough.

Too simple. The "how" of the court's treatment of the mortgage condition might seem consistent with the received common law rule governing conditions,<sup>31</sup> but the "why" and the "when" of the court's divisibility analysis are not. The insurer interpreted its obligation as

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28. *German Ins. Co. v. Fairbank*, 32 Neb. 750, 752-53, 49 N.W. 711, 712 (1891).

29. *Id.* at 753-54, 49 N.W. at 712.

30. *Id.* at 754, 49 N.W. at 712.

31. There was nothing innovative in the Nebraska Supreme Court's use of the divisibility technique to render the mortgages irrelevant to Fairbank's claim. Two years earlier, in *State Ins. Co. v. Schreck*, 27 Neb. 527, 4 N.W. 340 (1889), the court divided a similar policy into separate coverages for personalty and realty in order to avoid the consequences of a similar mortgage clause, and divisibility arguments have been a staple of insurance law throughout its history. See generally R. WORKS, *supra* note 22, at 99-103.

"entire": "We will pay for covered losses to your insured property if you have not mortgaged any of your insured property." The court interpreted the insurer's obligations as several, each with associated conditions: "We will pay for covered losses to your cows if you have not mortgaged your cows; we will pay for covered losses to your horses if you have not mortgaged your horses; . . . ." Why, we may fairly ask, should the court choose one interpretation over another? When, we may wonder, should we anticipate that a policy will be interpreted as divisible?

The court explained its interpretive choice this way:

Had [Fairbank] sold the horses it would not have affected the insurance on the cattle. The fact that they were incumbered did not affect or render less valuable the title of the insured in the cattle, nor was the risk on the cattle thereby increased.<sup>32</sup>

In other words, the court assumed that the insurer included the mortgage condition to respond to real insurer concerns. Mortgaging the cattle would matter to an insurer of the cattle, in the court's common sense calculus, because it would increase the moral hazard applicable to the cattle—the likelihood that the insured would destroy the cattle or be less careful with them. Thus, it makes sense for the insurer to condition its coverage of the cattle on them being free from incumbrances. But, by the same common sense calculus, mortgaging the other property of the insured does not matter to an insurer of the cattle—*qua* insurer of cattle—because such mortgages make the insured no more likely to intentionally destroy the cattle or to be less careful with them.

Thus, interpreting the *Fairbank* policy as divisible involves ascribing a purpose to the mortgage condition—understanding it to be a moral hazard warranty designed to control moral hazards to which the insurer otherwise might be exposed—and declaring that, as regards Fairbank's dead cow, that purpose has been served. And, regardless of whether the purpose ascribed is chosen well or badly,<sup>33</sup> that is pre-

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32. *German Ins. Co. v. Fairbank*, 32 Neb. 750, 755, 49 N.W. 711, 713 (1891).

33. Recognizing that the mortgage condition is a reflection of insurer concerns about moral hazard is only the first step in ascribing a purpose to the mortgage condition. A court might accept the insurer's implicit assumption that mortgaging one horse is likely to make the insured less protective of that horse without assuming also that mortgaging one horse is likely to make the insured less protective of his other horses, or his cows. That is the basis of the *Fairbank* divisibility analysis. It quickly becomes more complicated. Should a mortgage on the house prevent recovery for loss, not only to the house, but also to unscheduled property kept in the house? The *Fairbank* policy classified these different species of property as subject to different limits. If one understands the insurer's concern to be that incumbrances on the house increase the moral hazard, then that concern might be thought to extend not only to the house, but also to the contents, no matter how the policy limits may be structured. Or does the insurer's use of separate limits manifest its conclusion that the risks are separable? Cf. *State Ins. Co. v.*

cisely what the strict common law rule governing the effect of failures of condition purports to prohibit.<sup>34</sup> Never mind that the black letter rule insists that "it is immaterial whether the purpose intended by the warranty has been answered or not."<sup>35</sup> Never mind that the strict common law rule makes irrelevant whether the breach prejudiced the insurer. Never mind that the court could have concluded that the drafter of the mortgage condition intended to exploit the strict common law rule and to give the insurer a defense whenever there was an incumbrance, no matter how technical the failure of condition. In 1891 in Nebraska, *Fairbank* tells us if we are willing to listen, there is no need to be self conscious about asking if a failure of condition prejudiced the insurer, so long as the question can be dressed up in an apparently technical doctrine like divisibility so that it appears to be an inquiry into whether the condition was satisfied, rather than an inquiry into the effect of a failure of condition on the insurer. By adopting a purposive approach to the interpretive problem of determining what the mortgage condition required, the court collapses the positivist conceit that the search for the meaning of the condition can

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Schreck, 27 Neb. 527, 43 N.W. 340 (1889)(dividing policy between realty and personalty without apparent regard to whether the mortgage on the realty might also have increased the risk of loss to the personalty).

Of course, divisibility analyses, even when driven by noncontroversial ascriptions of purpose, can get fuzzy along the margin. Should the policy also be divisible by cause of loss, so that ascribing to the mortgage condition the purpose of controlling moral hazard means that the presence of a mortgage on the insured house will prevent recovery if it was destroyed by arson prompted in part by the insured's reduced interest in the house, but not if it was destroyed by lightning? Unless, of course, the insured's reduced interest in the house prompted him to forego lightning rods, which would have . . . . In a passage that seemed to anticipate the public policy enshrined in the contribute to the loss statute, the *Fairbank* court indicated that it was willing to divide policies by cause of loss: "It cannot be successfully claimed that the hazard of wind storms was increased by the incumbrance on the property." *German Ins. Co. v. Fairbank*, 32 Neb. 750, 755, 49 N.W. 711, 712 (1891). For an example of another court willing to divide a policy by cause of loss, see *Diesinger v. American & Foreign Ins. Co.*, 138 F.2d 91 (3d Cir. 1943).

For a suggestive overview of the process of ascribing purposes, see Nonet, *The Legitimation of Purposive Decisions*, 68 CALIF. L. REV. 263 (1980).

34. See, e.g., 3 J. JOYCE, A TREATISE ON THE LAW OF INSURANCE OF EVERY KIND § 1970, at 3234 (2d ed. 1917):

No departure can be allowed in the slightest particular in any matter warranted. The very purpose and meaning of a warranty is to preclude all questions for what purpose it was made, or whether it was made for any purpose at all . . . . [T]here is, says Lord Mansfield, no latitude, no equity.

See also E. PATTERSON, ESSENTIALS OF INSURANCE LAW § 61, at 239 (1935)("[T]he rule came down to this, practically: that the insurer's motives for inserting the warranty would not be inquired into.")

35. D. HUGHES, *supra* note 27, at 308 (1833).

be kept divorced from a consideration of its effects, and in the process subverts the strict common law rule without having to confront it.

## 2. *The Suit Condition*

Fairbank's policy also required that the insured commence suit within six months after the loss:

It is mutually agreed that no suit or action against this company upon this policy shall be sustained in any court of law or equity, unless commenced within six months after the loss or damage shall occur, and if any suit or action shall be commenced after the expiration of said six months the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.<sup>36</sup>

Loren Fairbank's cow died on January 12, 1888. On September 27, 1888, some eight months and fifteen days later, Fairbank brought suit against the insurer. Nonetheless, according to the Nebraska Supreme Court, the suit condition had been satisfied. The requirement that suit be brought "within six months after the loss or damage shall occur" was to be read together with a provision requiring that notice be given immediately, a provision requiring that proofs of loss be given within thirty days, and a provision requiring that the insurer's obligation to pay be satisfied within 90 days after notice and proofs of loss had been made.

It will be observed that . . . [the insurer] did not become liable to pay the loss until ninety days after the making of the proofs of loss. The money was not due, and the holder of the policy could not have lawfully demanded payment until that time had elapsed. No suit, therefore, could have been commenced prior to the expiration of ninety days after the loss, and it is well settled that the period of limitation will not commence to run until the cause of action accrues. The fair and reasonable interpretation of the provisions of the policy, when construed together, is that the limitation of six months did not begin to run from the date of loss, but from the time the suit could have been brought.<sup>37</sup>

Thus, a suit brought eight and one-half months after the cow was destroyed satisfied a policy provision requiring that suit be brought "within six months after the loss or damage shall occur."

Because this result also is cast as the product of interpretation, it too involves no direct confrontation with the strict common law rule. The court does not have to say that a delay of two and one-half months did not prejudice the insurer. Nor does it have to read "loss" as ambiguous so that it can use the *contra proferentem* tie-breaker to select the alternative meaning most favorable to the insured. Instead, once again, the critical move by the court comes as part of the process of interpreting the policy language. The court's interpretation involves an ascription of a particular purpose for the policy provision; under-

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36. *German Ins. Co. v. Fairbank*, 32 Neb. 750, 755, 49 N.W. 711, 713 (1891).

37. *Id.* at 756, 49 N.W. at 713.

standing it not as a simple repose provision designed to establish an independent outer limit to the insurer's exposure to suit, but as a contractual shortening of the statute of limitations (with its additional aims of discouraging claimants from sleeping on their rights and protecting the judicial process from error and manipulation), permits the court to use accrual of the claim rather than death of the cow as the trigger for the start of the six month period. Once again, the alternative interpretation, that the provision was intended to act as a repose provision, and thus to be "strictly performed," is rejected. Once again, the court is able to subvert the strict common law rule without even mentioning it.

### 3. *The Proofs of Loss Condition*

Fairbank's policy also required that proofs of loss be made within thirty days of the loss. The petition alleged that all conditions had been satisfied, and the insurer responded with a general denial. No evidence was introduced at trial concerning whether the proofs of loss were ever made. The issue was not briefed on appeal. Nonetheless, the court held that Fairbank's failure to prove he had made timely proofs of loss meant that the district court's judgment in Fairbank's favor must be reversed.

Here, at least, it might appear that the orthodox law of conditions still had teeth. The trial court decision was reversed because there was no showing that the proof of loss condition had been met. That fact alone was enough to prevent recovery. No inquiry was required, or permitted, into whether the insurer was prejudiced by the failure.

But here, too, the more we learn of *Fairbank* and its context, the less secure the strict common law rule appears. *Fairbank* turned on a failure of proof. The record did not show that Fairbank had satisfied the proof of loss provision. But neither did it show that Fairbank was late in his proofs of loss, or that his proofs of loss were defective, or that he had lied in his proofs of loss. The district court decision was reversed, and the case remanded. What happened thereafter is lost to history. But what history does tell us is that even a clear-cut determination that the insured had failed to make the proofs of loss in a timely fashion would not necessarily have ended the matter. Even in 1891 there was available in Nebraska law and elsewhere the raw materials and the tradition of using them that might have permitted Fairbank to escape from the orthodox failure of postloss condition analysis.

In 1891, as now, there was no question that postloss conditions like the proof of loss provision were to be treated as conditions precedent to the insurer's duty to pay. *McCann v. Aetna Insurance Co.*,<sup>38</sup> the

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38. 3 Neb. 198 (1874).

first appellate insurance decision in Nebraska, made that clear. Barely months later, however, in the second Nebraska appellate insurance decision, *Continental Insurance Co. v. Lippold*,<sup>39</sup> the court already was shrinking from the conventional implications of that classification. In *Lippold*, a policy provision required immediate notice after loss; Lippold was slow to comply. Nonetheless, said the court, the notice was immediate enough to satisfy the condition. Why? Because "it is a sufficient compliance with the condition of a policy, requiring notice of loss to be given 'forthwith' or 'immediately,' that the party has used due diligence under all the circumstances."<sup>40</sup> Moreover, "[t]he clause in a policy as to preliminary proofs, notice, etc., should always be construed with great liberality; and it only requires reasonable information to be given so that the company may be enabled to form some estimate of its rights and duties before it is obligated to pay."<sup>41</sup> Thus, whether the notice had been given "immediately" turned on whether the insured had been unreasonably dilatory and on the effects of the delay in notifying the insurer. Once again, purposive interpretation defangs the strict common law rule. Once again, the court refuses to ascribe to the insurer the purpose of using the policy language in conjunction with the strict common law rule to provide itself with a purely "technical" defense. As the *Lippold* court summarized:

A contract of insurance, like other contracts, should receive, if possible, such construction as will carry it into effect. The insurer having received the consideration for assuming the risk, there is no reason why he should be discharged from liability in case of loss, on slight or merely technical grounds.<sup>42</sup>

In the years between *Lippold* and *Fairbank*, the Nebraska Supreme Court made it clear that its unwillingness to apply the strict common law rule to postloss conditions was not limited to efforts to interpret malleable adverbs like "immediately." Did the insured violate a postloss condition requiring that he include with his proofs a certificate of "a magistrate . . . nearest the place of the fire" by submitting a certificate from the wrong magistrate? No problem. Where "an honest effort was made to comply with the policy," and the insurer's "objections to the proof of loss as furnished were technical, and apparently not prompted by a desire to know the real facts," the court would make sure that "no merely technical objection, not materially affecting the risk, [was] available as a defense."<sup>43</sup> Did the insured willfully exaggerate the amount of loss in his proof of loss, thus apparently violating a policy condition declaring the policy void if the

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39. 3 Neb. 391 (1874).

40. *Id.* at 395.

41. *Id.* at 396.

42. *Id.* at 397.

43. *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 510-11, 41 N.W. 406, 407 (1889).

insured engaged in fraud or false swearing? "This is reprehensible, but if no one is defrauded thereby it is difficult to perceive any just ground upon which to base a forfeiture."<sup>44</sup> Did the insured submit proof of loss to the general agent, rather than to the insurer, as required by the policy? "While proof of loss must be furnished, all that the law requires is a substantial compliance with that provision."<sup>45</sup> Small wonder, then, that the attorneys briefing the case for the insurer in *Fairbank* turned to a non-insurance decision<sup>46</sup> for their authority for the general proposition that non-compliance with a condition means that the conditional duty does not arise. And small wonder that a leading insurance treatise of the period cites *Fairbank* for the proposition that "[a]lthough a failure to make proofs of loss within the stipulated time does not cause a forfeiture of the policy, it is necessary that proofs be submitted before an action can be maintained."<sup>47</sup> But, then, the decisions tell us, even that was not necessarily true: even a complete failure to submit the proofs of loss would not bar recovery if the failure was excused due to waiver,<sup>48</sup> breach by the insurer,<sup>49</sup> or impracticability.<sup>50</sup>

44. *Springfield Fire & Marine Ins. Co. v. Winn*, 27 Neb. 649, 654, 43 N.W. 401, 402 (1889).

45. *Insurance Co. of N.A. v. McClimans & Coyle*, 28 Neb. 653, 657-58, 44 N.W. 991, 991-92 (1890). The court continued:

A party who in good faith has insured his property, and paid the premium demanded for that purpose, may reasonably expect that the insurer will also act in good faith, and, upon receiving notice and proof of the loss, promptly adjust and pay the same. Technical objections ought not to be sustained to defeat the right . . . .

*Id.* at 658, 44 N.W. at 992.

46. *Livesey v. Omaha Hotel Co.*, 5 Neb. 50 (1876). *Livesey* was the only Nebraska decision cited by the insurer. Brief of Plaintiff in Error at 8, *German Ins. Co. v. Fairbank*, 32 Neb. 750, 49 N.W. 711 (1891). Fairbank's attorney did not file a brief.

47. C. ELLIOTT, A TREATISE ON THE LAW OF INSURANCE § 307, at 317 (1907).

48. *See, e.g., Hartford Fire Ins. Co. v. Meyer*, 30 Neb. 135, 46 N.W. 292 (1890) (failure of condition waived because objections to defective proof of loss were not specific).

49. *Phenix Ins. Co. v. Bachelder*, 32 Neb. 490, 49 N.W. 217 (1891) (absolute denial of liability by insurer waives compliance with proof of loss condition); *Nebraska & Iowa Ins. Co. v. Seivers*, 27 Neb. 541, 43 N.W. 351 (1889) (same).

50. In Nebraska, the fountainhead decision excusing failure of a postloss condition on the basis of impracticability was still a decade away. In *Woodmen Accident Ass'n v. Pratt*, 62 Neb. 673, 87 N.W. 547 (1901), the Nebraska court aligned itself with a long line of impracticability decisions from other states, and in the process delivered what may well have been the court's most ringing denunciation of technical failure of condition defenses, and its most straightforward statement of the goal of judicial efforts to ascribe purposes to policy provisions:

The defense is purely technical. The risk assumed by the insurer has not been increased or in anywise jeopardized by the failure of the insured to comply literally with the provisions for notice . . . . If the provision quoted must under all circumstances and regardless of conditions be absolutely and strictly complied with according to the letter thereof, then the contract can only be regarded as a snare and pitfall sure to entrap the unwary and deprive them of the protection and indemnity contracted for



### B. *Fairbank* Located

And so? Does unbuttoning *Fairbank* to find its underpinnings show us more than we think we want to see? How should we understand the tension between the received law of conditions and the results actually being reached?<sup>51</sup> From a century away, with more recent decisions to reassure us that the strict common law rule still can have teeth when applied to postloss conditions, it is tempting to see in *Fairbank* only anachronistic aberrations, perhaps to be chalked up to Populist passions of the period, or to the inadequacies of law practiced without Lexis, Westlaw, and the calming certitudes of a one-volume edition of Williston.

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on their part in the best of faith and honesty of purpose . . . . There is, presumably, pervading every contract a reason based on something substantial, capable of conception and analysis by the human mind, for the terms and conditions mentioned and prescribed therein . . . .

*Id.* at 677-78, 87 N.W. at 548.

51. Roscoe Pound, while sitting as Commissioner for the Nebraska Supreme Court, described the situation this way:

[T]here has been a contest between the courts on the one hand and counsel for insurance companies on the other, the latter devising skillfully framed clauses and provisions, and the former largely thwarting the purpose of these clauses by construing them strictly against the insurer. It cannot be denied that not a little subtlety has been displayed on both sides of this contest.

*German Ins. Co. v. Shader*, 68 Neb. 1, 8, 93 N.W. 972, 975 (1903). The quotation is sometimes invoked in support of the proposition that the tension reflects a battle of wits rather than a struggle over substance, but that seems an inapt characterization of both the decisions and the Pound quotation. For another explanation from the same era, this one from within the industry, see C. GROSS, *Insurance Law*, in 2 YALE INSURANCE LECTURES: FIRE AND MISCELLANEOUS 329, 347-349 (1903):

The chaotic condition of insurance law since 1800 is due very largely to the failure of the lawyers, courts, and juries, and oftentimes of the legislatures, to recognize the true principles of indemnity. Insurance law, as it has been manufactured in the United States at least, has been largely a chapter in the law of contracts for the reason that most cases have turned on the interpretation of the provisions of the policy. Until within a few years, every insurance company formulated a policy to suit itself, containing innumerable conditions, both precedent and subsequent, often inconsistent with each other, confusing to the insured, difficult to interpret, and very obnoxious to the public generally.

The result up until about 1880 was a general hostility to any insurance company that defended a case in court. The companies as a class were largely to blame for this. Many companies contested every loss in which a shrewd lawyer could devise a defense on the facts, or raise a doubt as to the construction of the policy. The greater the number of defenses, the stronger each was regarded as becoming. This course of dealing with the insured prejudiced the general public, from whom juries are drawn, and the general atmosphere of the courtroom was full of suspicion and, often, unbelief. This prejudice extended to the judges, and a reputable company with a perfectly valid defense often had difficulty in obtaining an impartial trial.

A closer look suggests that those are temptations that should be resisted. Doubtless there was room for insurance companies, especially foreign insurers, among the "interests" aligned on the wrong side of the Populists' Manichean universe, and eventually anticomcompact legislation<sup>52</sup> would be enacted and the insurance regulatory structure would be bolstered.<sup>53</sup> But in the years immediately prior to 1891 the expressed grievances that drove the agrarian discontent focused less on insurers<sup>54</sup> than on the more traditional antagonists: the railroads, mortgage lenders, tariffs, taxation, and the appreciation of the dollar.<sup>55</sup> Nor is it easy to force the *Fairbank* judges into Populist garb;<sup>56</sup> there is no reason to think that the Political Revolution of 1890 had made its way into the Nebraska Supreme Court chambers by 1891. What is more, the judicial disinterest in applying the strict common law rule to postloss conditions was not a sporadic thing, nor did it suddenly flower with the rise of the Populists; it had been a persistent feature of Nebraska insurance law from the third volume of the *Ne-*

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52. 1897 Neb. Laws ch. 81 §§ 1-4.

53. In 1899 the Nebraska Legislature created the Department of Insurance and made the Governor the Commissioner of Insurance. 1899 Neb. Laws ch. 47. Prior to that, from 1873 to 1899, the Auditor of Public Accounts and the attorney general had some minimal supervisory responsibilities over insurers.

54. In 1889, the Nebraska Legislature did adopt valued policy legislation over the determined opposition of the insurance industry. 1889 Neb. Laws ch. 48 § 1.

55. See generally J. HICKS, *THE POPULIST REVOLT* (1931); R. HOFSTADTER, *THE AGE OF REFORM* 60-81 (1955); J. OLSEN, *supra* note 14, at chs. 17-18; S. PARSON, *THE POPULIST CONTEXT: RURAL VERSUS URBAN POWER ON A GREAT PLAINS FRONTIER* (1973); N. POLLACK, *THE POPULIST MIND* (1967). See also Farmer, *The Economic Background of Frontier Populism*, 10 MISSISSIPPI VALLEY HIST. REV. 406 (1924).

56. Judge Theopolis Lincoln Norval, the author of the supreme court opinion, was a Republican stalwart whose nomination and election to the Nebraska Supreme Court were widely regarded as engineered by the Union Pacific Railroad. 1 A. SHELDON, *supra* note 5, at 661. The popular perception had not changed by the election of 1895, where he was subjected to venomous attacks by the Populists. For a systematic and sympathetic portrait, see F. LANDIS, *LIFE AND JUDICIAL CAREER OF T.L. NORVAL* (1937). General Cobb, the Chief Justice, "had long been a favorite of the railroads," though when he was defeated for renomination at the Republican convention in 1891, some saw the railroads' hands in that as well. See generally Nelson, *supra* note 5. Judge Gaslin, the trial judge, was forced from the bench in the Populist landslide in 1893. See generally J. HASKELL, *supra* note 4.

Only Judge Maxwell had any association with the Populists, and that did not come until 1895, after he had served twenty-one years on the court as a Republican. "Substantial Justice Maxwell" was dumped by the Republicans in 1893, supposedly because his anticorporate bias had contributed to decisions unfavorable to railroads. He was the unsuccessful Populist nominee for the court in 1895 (he lost to Judge Norval), and was elected to Congress in 1896 as a Silver Republican Fusionist. R. CHERNY, *POPULISM, PROGRESSIVISM, AND THE TRANSFORMATION OF NEBRASKA POLITICS, 1885-1915*, 44, 48, 86 (1981). For an especially strong characterization of Maxwell's "anti-monopoly attitude," see 3 J. MORTON & A. WATKINS, *ILLUSTRATED HISTORY OF NEBRASKA* 104 (1913); for a more balanced view, see R. ROWLEY, *SAMUEL MAXWELL, DEAN OF NEBRASKA JURISPRUDENCE* (1928). See also 61 Neb. vii-xxi (1902) (eulogies and reminiscences of Judge Maxwell).

*braska Reports.*<sup>57</sup>

Even more telling, however, is what the treatises of the day had to say about these matters.<sup>58</sup> Though *Fairbank*'s treatment of the mortgage clause by itself might be viewed as an idiosyncratic interpretation directly at odds with the intent of the drafters, in fact, by the turn of the century it was widely recognized that the courts "quite generally" took the *Fairbank* view,<sup>59</sup> and commentators reported that conditions

57. See *Continental Ins. Co. v. Lippold*, 3 Neb. 391 (1874). For a recitation of a similar history in Wisconsin, see S. KIMBALL, *INSURANCE & PUBLIC POLICY* 209-15 (1960).

Judge Maxwell's dual role in the creation of the early Nebraska law of postloss conditions bears noting. In a succession of editions of his *A TREATISE ON THE POWERS AND DUTIES OF JUSTICES OF THE PEACE, SHERIFFS, CORONERS, AND CONSTABLES IN THE STATE OF NEBRASKA* (subtitled "Together with a Concise Statement of the Law Relating to Accord and Satisfaction, Animals, . . . Insurance, . . . Etc., Etc."), he quoted his own *Lippold* language inveighing against forfeitures based on technical failures of condition; in the 6th edition, published in 1894, the quotation from *Lippold* was followed by this note:

A contract of insurance entered into in good faith by the parties, and the premium paid, should be enforced. If the loss was not the act of the insured with intent to destroy the property and recover the amount of the policy, no merely technical objection should be permitted to defeat a recovery. The company has received and retains the consideration for the insurance and should be required to perform its contract. Where the policy requires the proof of loss to be made within a specified time after the loss occurs there must be a substantial compliance with the provision, unless it is waived. [*German Ins. Co. v. Fairbank*, 32 Neb. 750, 757 (1891)]. But where the insurance company denies absolutely its liability on the ground that the policy was not in force it will be considered a waiver of proof of loss. [*Phenix Ins. Co. v. Bachelder*, 32 Neb. 490, 494 (1891)]. The safe course, however, is to make proof of loss.

S. MAXWELL, *A TREATISE ON THE POWERS AND DUTIES OF JUSTICES OF THE PEACE, SHERIFFS, CORONERS, AND CONSTABLES IN THE STATE OF NEBRASKA* 649-50 n.2 (6th ed. 1894).

58. In the years leading up to *Fairbank*, when lawyers cited treatises to the court, they were insurance treatises, not contracts treatises, and they generally treated the strict common law rule as the rule in substance as well as form. See, e.g., D. HUGHES, *supra* note 27, at 308; H. WOOD, *supra* note 27, § 135, at 270. Later insurance treatises reacted to anomalies that could not be reconciled with the strict rule in one of two fashions. Some, in the manner still on display in both specialized insurance and generalized legal encyclopedias, managed to signal the tension without facing up to its implications. Thus, it is possible to find commentators unblushingly reciting the strict rule cheek and jowl with fundamentally subversive directives to search for the purpose of the policy provision. As intellectual fashions changed, and the taxonomic search for patterns of treatment of "operative facts" came into vogue, treatise writers began to report that the strict common law rule was a better guide to results in some settings than in others, and thus to classify insurance policy provisions in terms of their relative vulnerability to judicial techniques that avoided a literal application of policy language. See, e.g., 3 J. JOYCE, *supra* note 34, § 1971, at 3238 (section entitled "Is there a tendency to relax [the strict common law rule]?").

59. See, e.g., E. HARDY, *FIRE INSURANCE LAW* 49-50 (1918) (characterizing the penchant of courts to treat moral hazard warranties as divisible as "one of the two cases where the courts have ruled differently on the standard policy than the

dealing with limited interests, incumbrances, and alienation were not receiving the judicial respect the strict common law rule seemed to require.<sup>60</sup>

In much the same fashion, what in isolation might appear to be creative interpretive legerdemain by the *Fairbank* court to transform a six-month suit condition into an eight and one-half month suit condition turns out to be an established interpretive turn.<sup>61</sup> And, we discover, the rough treatment the Nebraska Supreme Court accorded postloss conditions and the strict common law rule was not a phenomenon limited to Nebraska or even to midwestern hotbeds of anticorporation animus.<sup>62</sup> Indeed,

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[drafters] desired or even planned"). See also G. RICHARDS, A TREATISE ON THE LAW OF INSURANCE §§ 116 & 246, at 154, 305 (3d ed. 1929); Patterson, *Warranties in Insurance Law*, 34 COLUM. L. REV. 595, 629 (1934); Notes, 12 COLUM. L. REV. 65 (1912); *Recent Decisions*, 11 COLUM. L. REV. 685 (1911); *Recent Cases*, 14 HARV. L. REV. 301 (1900); *Recent Important Decisions*, 8 MICH. L. REV. 67 (1909).

60. See W. VANCE, HANDBOOK ON THE LAW OF INSURANCE §§ 158-161, at 442, 454 (1904). In Vance's view:

Some courts have taken the view that the comprehensive terms of [the change in interest, title, or possession condition] necessarily include any changes whatever in the insured's interest, but the majority of the courts, induced either by precedents construing older, less comprehensive forms, or moved by a determination not to permit a merely technical defeat of a contract entered into in good faith by the insured, have shown a strong inclination to except from the operation of this condition such immaterial changes of interest as do not diminish the value of that interest or increase the moral hazard of the risk.

*Id.* at 450 (footnote omitted). See also C. ELLIOTT, *supra* note 47, §§ 257-282, at 241-79; G. RICHARDS, *supra* note 59, §§ 261-268, at 340-356. Cf. *Grable v. German Ins. Co.*, 32 Neb. 645, 49 N.W. 713 (1891) (decision filed same day as *Fairbank* holding contract for sale of insured property did not violate condition prohibiting changes in title or interest).

61. See W. VANCE, *supra* note 60, § 191, at 507-10 (reporting that "probably a majority of the courts came to hold that the specified period did not begin to run until a right of action accrued"); C. ELLIOTT, *supra* note 47, § 330, at 360-61 (collecting authorities for "two directly opposing lines of authorities," and citing *Fairbank* for the proposition that time begins to run under a suit provision when a right to bring the action exists); G. RICHARDS, *supra* note 59, § 300, at 408 (collecting authorities for this "unsatisfactory and strained construction").

Changing the policy language from "after the loss" to "after the fire" did not force the court to change its interpretation. See *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N.W. 698 (1894) (period begins to run when right of action accrues). Other jurisdictions agreed. See W. VANCE, *supra* note 60, § 191, at 509 n.182 (collecting authorities).

Eventually, the Nebraska Supreme Court decided that the condition was absolutely void as contrary to public policy. *Miller v. State Ins. Co.*, 54 Neb. 121, 74 N.W. 416 (1898); *Omaha Fire Ins. Co. v. Drennan*, 56 Neb. 623, 77 N.W. 67 (1898).

62. See, e.g., G. RICHARDS, *supra* note 59, § 296, at 402 (detailing reasons why proofs of loss, though of great importance to the insurer, as "to matters of mere detail" and "mere matters of form relating to an estimate of loss already sustained should not be too punctiliously insisted upon by the courts"). See also W. VANCE, *supra* note 60, §§ 184-189, at 497 (1904):

[t]he provisions of the insurance contract fall naturally into two classes separated by the fact of loss. While all provisions are valid and binding upon the parties, they are not for purposes of construction treated as of equal importance. It is apparent that matters required to be done by the insured after the capital fact of loss should not be construed with the same strictness as those which define and limit the terms of the contract itself.<sup>63</sup>

And so? What do we know once we know that sometimes the strict common law rule proves not so strict, and that the classifiers tell us its hegemony has been challenged more often in some areas than in others? We know at least that understanding *Fairbank* and the history of which it is emblematic requires something more than an accumulation of such details. History is not, except in the most trivial of senses, old facts, even well chosen, well classified, old facts. A usable history responsive to modern questions requires an explicative interpretation sensitive to both perspective and context. By the same token, insurance law ought to be something more than decisions classified according to their operative facts. A usable law of insurance able to mediate the tension between the banal generalized formal rules and the buzzing confusions that immersion in detail discloses requires an understanding of the legal and business traditions from which such decisions derive.

In Part III of this Article I offer one version of such a broadly limned historical explanation for what we have learned of *Fairbank* and its context, and of how that fits into a longer view of the history of this part of insurance and insurance law. Without the guidance of such an argument—a theory of what the courts are doing—*Fairbank* and its ilk are likely to appear unprincipled and unpredictable, lightning bolts from the judicial blue that understandably leave lawyers and insurers to wonder whether it was the message of the policy provision, the way it was presented, or some unprincipled search for a deep

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All those conditions of the policy making requirements of the insured after loss are intended merely for evidential purposes, and do not properly form any part of the conditions of liability. That the insurer should have the evidence that he stipulates for is most reasonable and proper, and it is also reasonable that he should be allowed to stipulate for a penalty to be imposed upon the insured if he fails to give the evidence required by the contract. But all of these conditions concern matters after the loss. When they contain provisions of forfeiture they must be regarded as penalties defeating a right that has already accrued. Such being the nature of these conditions, it is manifest that the general rules of construction require that they shall be construed with much less strictness than those conditions that operate prior to the loss. A condition subsequent should never be construed as defeating an already vested right, unless the intention of the parties to create a forfeiture is unquestionable. In accordance with these principles, we find the majority of the courts most unwilling to give such a construction to these subsequent conditions as will defeat the rights of the insured, unless the facts of the case show fraud or clear injustice to the insurer.

63. C. ELLIOTT, *supra* note 47, § 302, at 308.

pocket that prompted the judicial refusal to enforce the policy provision as written.<sup>64</sup>

The lightning metaphor is apt for reasons that go beyond its ability to capture the sporadic and apparently unpredictable character of such judicial interventions. Lightning, modern science tells us, is not the spiteful trick of capricious gods once imagined by our ancestors. It is a natural phenomenon with physical causes that can be studied and understood. What is more, despite the conventional wisdom to the contrary, lightning does not really strike at random. Recognition that some locations have proved especially susceptible to lightning has put scientists to work trying to identify those locations, and to isolate their common features, in order to predict where defensive measures are especially appropriate.<sup>65</sup>

So too with judicial decisions that refuse to require that standard insurance policy form provisions be literally performed. Judicial regulation of standard forms, modern contracts theory tells us, need not mean unprincipled judicial overreaching. Properly practiced, such judicial oversight rests on recognition that some provisions in standard forms lack the validation of actual agreement assumed by orthodox contract theory, and thus should be enforced only to the extent that their provisions can survive substantive judicial review.<sup>66</sup> While the theorists of standard forms have provided little explicit guidance concerning the standards that such judicial review should employ, and

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64. Such uncertainties have prompted generations of handwringing, much of it perversely collected and preserved in the introductions to insurance law casebooks. "What do they know of the law of the insurance contract who only the law of contract know?" asked Professor Woodruff long ago. E. WOODRUFF, A SELECTION OF CASES ON THE LAW OF INSURANCE (2d ed. 1924). Not much, other casebook authors hasten to warn. Professors York and Whelan declare, "Welcome to the wonderful world of Insurance. In it the rules of the law of Contracts are reflected as in a fun house mirror." K. YORK & J. WHELAN, INSURANCE LAW xv (1982). And listen to J. DOBBYN, INSURANCE LAW xix (2d ed. 1989): "The area of Insurance Law is a world unto itself. While theoretically it is merely an enclave of contract law, it is like a mine field, full of hidden traps for those who expect that words in a contract will be applied according to their usual meanings." As usual, Professor Keeton deserves the last word: "[T]he favorite generalization advanced by outside observers to explain a judgment against an insurance company at variance with policy provisions is the ambivalent, suggestive, and wholly unsatisfactory aphorism: 'It's an insurance case.'" R. KEETON, BASIC TEXT ON INSURANCE LAW § 6.1, at 341 (1971).

65. See, e.g., *Lightning Study Sparks a News Flash*, Washington Post, June 27, 1985, at A15, col. 1.

66. See generally RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981); 3 A. CORBIN, CORBIN ON CONTRACTS §§ 559A-559I (Kaufman Supp. 1984); Leff, *Contract as Thing*, 19 AM. U.L. REV. 131 (1970); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971). For a useful application of these developments in mainstream contract theory to the special problems of standard insurance policy forms, see Note, *A Common Law Alterna-*

insurance scholars have done only slightly better,<sup>67</sup> legal observers have long recognized that judicial lightning is more likely to strike some sorts of policy provisions than others. Consequently, we might consider the tasks for students of insurance law, as for students of lightning, to be: (1) to identify the sorts of policy provisions that have proved especially vulnerable to judicial interventions; and (2) to develop explanations for why these provisions so often are singled out for rough treatment.<sup>68</sup>

The next Part is an effort of the latter sort. It takes as its starting point the wide-spread recognition among insurance commentators that moral hazard conditions<sup>69</sup> and postloss conditions<sup>70</sup> like the mortgage condition and proof of loss condition involved in *Fairbank* historically have been especially likely to receive less-than-enthusiastic judicial receptions, and argues that these apparently unrelated pockets of judicial activity reflect a common judicial concern with policy provisions that seek to control the "juridical hazard" to which insurers would otherwise be subject. Thus, the thesis is a simple one: Policy provisions drafted to minimize "juridical hazard" are especially vulnerable to judicial scrutiny, because they carry the potential for defenses based on a "merely technical objection, not materially affecting the risk."<sup>71</sup> That explanation, if accepted, should be a reassuring one, for a significant part of what novices, skeptics, and insurance company retainers regard as judges playing fast and loose with policy language is really purposive interpretation that limits policy overbreadth designed by insurers as a defense against "juridical hazard."

### III. LEGAL CONTROL OF JURIDICAL HAZARD PROVISIONS

#### A. What Are "Juridical Hazard" Provisions?

Standard insurance policy forms function to define and to control the risk transferred to the insurer. In the conventional theoretical

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*tive to the Doctrine of Reasonable Expectations in the Construction of Insurance Contracts*, 57 N.Y.U. L. REV. 1175 (1982).

For a discussion of how these themes play in Nebraska, see R. WORKS, *supra* note 22, at ch. 2.

67. The two most important efforts are Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 1281 (1970) and Young, *Insurance Policy Defenses: In Search of Restatements*, 34 ARK. L. REV. 507 (1981).

68. See generally Schultz, *The Special Nature of the Insurance Contract: A Few Suggestions for Further Study*, 15 LAW & CONTEMP. PROBS. 376 (1950).

69. See generally E. PATTERSON, *supra* note 34, § 68, at 280-90; Goble, *The Moral Hazard Clauses of the Standard Fire Insurance Policy*, 37 COLUM. L. REV. 410 (1937); Patterson, *supra* note 59.

70. See generally E. PATTERSON, *ESSENTIALS OF INSURANCE LAW* §§ 95-103, at 483-525 (2d ed. 1957); Morris, *Waiver & Estoppel in Insurance Policy Litigation*, 105 U. PA. L. REV. 925 (1957).

71. *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 510, 41 N.W. 406, 407 (1889).

literature of insurance, that risk is treated as composed of "physical hazard" and "moral hazard."<sup>72</sup> The absence of "juridical hazard" from these accounts is understandable. In a theoretical world of perfect information and frictionless contracting, "physical hazard" and "moral hazard" adequately summarize insurer concerns. In the real world, however, the insurer must deal with yet another problem: "juridical hazard," the concerns that attend recognition that insurance policy provisions are not self executing.<sup>73</sup> If the insurer's underwriting by policy provision is to operate as the insurer intends, the policy provisions must be properly understood, the facts properly ascertained, and the claim properly evaluated. As any adjuster or insurance lawyer will affirm, that does not occur automatically. Judgment and discretion are essential. Ultimately, of course, "the law has the last word as to the risks assumed by the insurer, and the law speaks through courts and through juries, which are fallible even if not biased."<sup>74</sup> When push comes to shove, an insurer is concerned not so much with whether the insured house will be destroyed by fire as it is with whether destruction of the house by fire will result in insurer liability. Thus, it is not surprising that insurance practice displays appreciation of juridical hazard even though much of the theoretical literature does not. Insurance policies routinely are drafted to control not only physical and moral hazards, but also juridical hazard.

A simple example may help to clarify how policy drafting can attempt to minimize juridical hazard. An insurer who wishes to be free of the physical and moral hazards posed by buildings that sit vacant for extended periods might provide in its policies that the insurer shall

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72. See, e.g., H. DENENBERG, R. EILERS, G. HOFFMAN, C. KLINE, J. MELANE, H. SNIDER, *RISK & INSURANCE* 8 (1964). Physical hazards are physical conditions that increase the likelihood or severity of loss; in property insurance, physical hazards traditionally have been treated as composed of construction hazards, occupancy hazards, protection hazards, and exposure hazards. Moral hazards, in the traditional insurance understanding, include any characteristics of the insured that might increase the likelihood or severity of loss. See also 2 W. GEPHART, *PRINCIPLES OF INSURANCE: FIRE* 89 (1917)(discussing physical hazards).

73. In the legal literature, the best treatment of "juridical hazard" is provided by E. PATTERSON, *supra* note 34, § 53, at 200, §§ 66-69, at 272-98; in the insurance literature, the most suggestive discussions are those which focus on the effects of informational deficiencies and asymmetries. A recent survey can be found in D. LEREAH, *INSURANCE MARKETS: INFORMATION PROBLEMS AND REGULATION* 56-62 (1985).

74. E. PATTERSON, *supra* note 34, § 53, at 200. Patterson continued:

If the elements of coverage were unambiguously defined and if the insured fully understood and honestly abided by them, or even if all the facts were indisputably ascertained and the terms of the contract infallibly applied by court and jury, insurers could get along with fewer conditions. These "ifs" are violent assumptions . . . .

*Id.*



not be liable for loss "caused by" the described building remaining vacant for more than sixty days. However, the standard fire policy does not read that way, and for good reason. In order to establish a defense under a provision excepting from coverage losses caused by an extended vacancy, the insurer would be required to show not only that the described building had remained vacant for longer than permitted by the policy, but also that the vacancy "caused" the loss. Needless to say, demonstrating the necessary causal nexus between the vacancy and the loss can prove messy. The facts may be difficult to establish, legal standards governing causal inquiries always seem to be in flux, and ascriptions of causal responsibility by triers of fact are notoriously difficult to predict. Insurers have sought to minimize such juridical problems by employing a simple bit of drafting. The loss is not covered, the policy says, if the loss occurred "while" the house was vacant beyond a period of sixty consecutive days. With this minor change, an insurer can try to substitute a relatively simple demonstration that the home was vacant for the much more difficult demonstration that the vacancy caused the loss, and thus hope to reduce the juridical hazard to which it otherwise would be exposed.<sup>75</sup>

The orthodox law of contracts neatly reinforces such policy drafting. In the world of fully bargained agreements hypothesized by simple contracts models, parties should be permitted to allocate risks (including risks attributable to juridical hazards) however they choose. If one party promises to pay if the building burns, but not if the building burns "while" the building has been vacant for more than sixty days, the fact of vacancy for more than sixty days at the time the building burns is enough to create a defense. There is no need to determine whether the prolonged vacancy was a "cause" of the loss. There is no need to determine whether the prolonged vacancy enhanced the risk that a loss would occur or enhanced the risk that a loss would be sizeable. There is no need to determine if the prolonged vacancy "prejudiced" the insurer. In such hypothetical fully bargained contracts, even a "merely technical" failure of condition should be enough to prevent the duty to pay from arising, for that is the allocation of risk to which the parties agreed.

## B. Why Juridical Hazard Provisions Are Vulnerable

What seems appropriate for the hypothetical world of fully bargained contracts may not seem so for standard forms in which provisions purporting to allocate significant risks have been unilaterally supplied by one party. Granted, the insurer's desire to economize on the costs associated with juridical hazards is a legitimate one.

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75. See generally Patterson, *supra* note 59; Vance, *The History of the Development of the Warranty in Insurance Law*, 20 YALE L.J. 523 (1911).

Granted, too, the insurer need not invoke every defense available to it;<sup>76</sup> it could, for example, reserve defenses based on violations of a "while vacant" provision for occasions where it believes that the underlying facts suggest that the extended vacancy contributed to the loss or increased the risk of loss to the insurer. But, by the terms of the strict common law rule, the insurer need not do so, and in that reserved discretion lies the vulnerability of juridical hazard provisions.

Lawyers and judges have been socialized by their training to regard unbridled discretion with suspicion. "The basic trouble with discretion," one leading scholar has written, "is simply that it is lawless, in the literal sense of that term."<sup>77</sup> An insurer that chooses to invoke a failure of condition defense in circumstances in which it appears that the failure did not prejudice the insurer creates the impression that it is employing a unilaterally supplied provision to create a "merely technical" defense that needlessly works a "forfeiture" of the insured's protection. And "forfeitures," not surprisingly, are a good bet to attract judicial hostility.

### C. A First Historical Example: Moral Hazard Warranties

Moral hazard warranties like the mortgage condition involved in *Fairbank* provide an important historical example of this phenomenon. For several decades in the late nineteenth and early twentieth centuries, property insurance policies were laden with provisions whose primary purpose was to protect insurers against moral hazards.<sup>78</sup> Of course, property insurers might have relied for protec-

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76. Selmer, *Gratuitous Deviation from the Terms of Form Contracts: Scandinavian Insurance Companies' Administration of Deferred Acceptance-of-Risk Clauses*, 33 U. CHI. L. REV. 502, 503 (1966), provides a useful discussion of the Scandinavian concept of "kulanse," the tendency to deviate from standard terms *ex gratia*. American insurers regularly assure that they do the same. Of course, the obverse of "kulanse" is "opportunism."

77. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 290 (1978). See also K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 3 (1969) (opining that "Where law ends, discretion begins").

78. The full text of the *Fairbank* mortgage condition is revealing:

If there is or shall be other prior, concurrent, or subsequent insurance (whether valid or not) on said property, or any part thereof, without the company's consent hereon, or if said buildings or either of them is or shall become vacant or unoccupied, or if the hazard shall be increased in any way, or if the property or any part thereof shall be sold, conveyed, incumbered by mortgage or otherwise, or any change takes place in the title, use, occupation, or possession thereof whatever; or if any foreclosure proceedings shall be commenced; or if the interest of the insured in said property, or any part thereof, now is or shall become any other or less than a perfect legal title and ownership, free from all liens whatever, except as stated in writing hereon; or if the buildings or either of them stand on leased ground or land, of which the assured [sic] has not a perfect title; or if this policy shall be assigned without the written

tion on the implied exception from coverage for losses caused by arson or other intentional destruction of the insured property. They might have provided explicitly in their policies that losses caused by arson or by careless housekeeping induced by the presence of insurance or by less-than-full interests in the property were excepted from coverage. In fact, they did neither. Instead, property insurance policies of that era were festooned with policy conditions declaring the policy void if the named insured was not "the unconditional and sole owner" of the insured property, if the property was covered by "other insurance," or if there were encumbrances on the property. The courts, including the Nebraska Supreme Court, responded with a barrage of decisions effectively limiting such provisions. Divisibility analyses like that applied in *Fairbank* provided a tool, but so also did waiver and estoppel, temporary breach, and other varieties of purposive interpretation. So common was this judicial reaction that soon the insurance literature was reporting that moral hazard warranties were especially likely to attract judicial hostility.<sup>79</sup>

At first blush, that special vulnerability might seem to suggest judicial hostility to the insurer's efforts to control the effects of moral hazard on its treasury. Of course, such an antisocial attitude would be difficult to defend. In fact, however, the judicial hostility toward moral hazard warranties was hostility toward the insurer's method, not hostility toward the ends it sought to achieve. Physical hazard warranties could also sweep broadly—the standard fire policy provision declaring the policy void "if an illuminating gas or vapor be generated in the described building" by its terms permitted the insurer to avoid liability whether or not the presence of the gas or vapor in fact enhanced the risk of loss or contributed to a loss—but at least most physical hazard warranties accorded more closely with lay perceptions of circumstances likely to affect the risk. By contrast, a provision that permitted the insurer to escape liability if the named insured's ownership was less than full simply did not display that same obvious common sense connection between the failure of condition and enhanced risk of loss, and thus was especially susceptible to judicial second-guessing. But it was the method of the moral hazard conditions, not their ends, that was responsible for their vulnerability.

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consent hereon, then and in every such case this policy shall be absolutely void.

German Ins. Co. v. Fairbank, 32 Neb. 750, 752-53, 49 N.W. 711, 712 (1891)(quoting the policy at issue).

79. See, e.g., Cohen, *Encumbering Realty as Affecting the Moral Hazard in Fire Insurance*, 24 COLUM. L. REV. 605 (1924); Goble, *supra* note 69; Patterson, *supra* note 59, at 617-18, 620-31.

#### D. The Legislative Response: Standard Forms and Warranty Statutes

Recognition of this pattern to what sometimes had been decried as unprincipled and unpredictable judicial behavior eventually permitted legislative remedial action to displace judicial activism as the primary regulator of overly-broad warranty provisions. Sometimes the legislation involved direct and specific intervention. Life insurance policy standardization statutes, for example, significantly curtailed the number of warranties permitted, replacing many "while" conditions with "caused by" provisions.<sup>80</sup> The legislatively prescribed standard fire policy went through similar changes.<sup>81</sup> But the generalized embodiment of concern with overly-broad warranties was felt in warranty statutes that attempted to compromise the insurer's legitimate interest in limiting its exposure to juridical hazard with the competing concerns that the insurer not be left with unbridled discretion to assert a failure of condition defense, whether or not the insurer had been prejudiced by that failure. Warranty statutes came in two forms, distinguished by the degree of prejudice they required the insurer to demonstrate before it would be permitted to invoke a breach of warranty defense. "Materiality" statutes permitted a defense if the insurer could show that the failure to satisfy a policy condition "materially increased the risk of loss." The New York warranty statute was typical: "No breach of warranty shall avoid an insurance contract or defeat recovery thereunder unless such breach materially increased the risk of loss, damage or injury within the coverage of the contract . . . ."<sup>82</sup> In Nebraska, however, the "contribute to the loss" statute forced even more of the costs of juridical hazard back on the insurer:

The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding.<sup>83</sup>

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80. See generally W. MEYER, *LIFE & HEALTH INSURANCE LAW* ch. 7 (1972). For a discussion of the amalgam of motivations for these changes, see M. KELLER, *THE LIFE INSURANCE ENTERPRISE 1885-1910* (1963); Keller, *The Judicial System and the Law of Life Insurance, 1888-1910*, 35 *BUS. HIST. REV.* 317, 320-23 (1961); Works, *Coverage Clauses and Incontestable Statutes: The Regulation of Post-Claim Underwriting*, 1979 *U. ILL. L.F.* 809, 855-57.

81. See generally Wenck, *The Historical Development of Standard Policies*, 35 *J. RISK & INS.* 537 (1968).

82. N.Y. *INS. LAW* § 150(2) (McKinney 1966).

83. NEB. *REV. STAT.* § 44-358 (Reissue 1988). The contribute to the loss statute was first adopted in 1913 as part of a comprehensive revision of the insurance statutes. 1913 Neb. Laws 419 § 51. It has never been amended. See generally R. WORKS, *supra* note 22, at ch. 3; Works, *Insurance Policy Conditions and the Nebraska Contribute to the Loss Statute: A Primer and a Partial Critique*, 61 *NEB. L. REV.* 209 (1982). For a summary critique of the contribute to the loss standard, featuring concerns about rate inequities, see R. KEETON, *supra* note 64, § 6.5(c), at 382-84.

In effect, that statute made *Fairbank's* suggestion that insurance policies could be treated as divisible by cause of loss the legislatively mandated interpretation for all policy conditions within its ambit. The statute did not try to constrain the insurer's discretion about which moral and physical hazards to control through conditional policy language, but it insisted that the insurer's legitimate desire to avoid the costs associated with demonstrating causality could not justify throwing the risk of forfeiture on the insured.

These developments effectively removed overly-broad warranties from the judicial agenda in Nebraska. Thereafter, warranties appeared much less frequently in the mainstream standard insurance policy forms, and when they were encountered, the warranty statute governed.

#### E. A Second Example: Postloss Conditions

The relevance of all this to understanding both old and new pockets of judicial reluctance to enforce immaterial failures of postloss conditions should be obvious. Warranties are not the only kinds of policy provisions crafted to avoid or finesse causation questions, and causation questions are not the only source of juridical hazard. Postloss conditions requiring timely notice to the insurer after an insured event, cooperation by the insured in the liability insurer's efforts to investigate a claim and mount a defense, and submission of proofs of loss in prescribed form should all be understood as transparent displays of insurer concerns about juridical hazard. Yet postloss conditions are not warranties; they do not try to protect the insurer against potential causes of a loss. Instead, they try to protect the insurer against potential complications in the insurer's efforts to adjust a loss that has already occurred. As a result, neither "materiality" nor "contribute to the loss" warranty statutes apply to such postloss conditions, for it makes no sense to ask whether the insured's failure to give notice within thirty days after a loss enhanced the risk that the loss would occur or contributed to the loss.<sup>84</sup>

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84. It has long been clear that postloss conditions are beyond the reach of the Nebraska contribute to the loss statute. *George v. Aetna Casualty & Sur. Co.*, 121 Neb. 647, 238 N.W. 36 (1931), initially gave birth to the heresy that the statute barred all defenses based on postloss conditions because a failure of a postloss condition logically could never contribute to a loss. That literal reading of the statute was shortlived. It was buried in *Clark v. State Farmers Ins. Co.*, 142 Neb. 483, 7 N.W.2d 71 (1942). The coffin lid was nailed shut in *Ach v. Farmers Mut. Ins. Co.*, 191 Neb. 407, 215 N.W.2d 518 (1974). No doubt the court hopes that *First Sec. Bank & Trust v. New Hampshire Ins. Co.*, 232 Neb. 493, 441 N.W.2d 188 (1989), and *First Sec. Sav. v. Aetna Casualty & Sur. Co.*, 233 Neb. 335, 445 N.W.2d 596 (1989), will be the stake through the heart.

For a more in-depth discussion of this history, see R. WORKS, *supra* note 22, at 65-68.

However, the instinct expressed with such force in the early moral hazard warranty cases and enshrined in the warranty statutes also applies to these postloss conditions. Like warranties, postloss conditions purport to reserve to the insurer the discretion to invoke the failure of condition even where it does not appear to have prejudiced the insurer. In the *Fairbank* era, the Nebraska Supreme Court's resistance to technical failure of condition defenses—whether a failure to satisfy a warranty or a failure to satisfy a postloss condition—was palpable. The headnotes of the time announced that concern; purposive interpretation, waiver, and estoppel vindicated it. Those decisions have never been overruled. Those instincts have never been repudiated. Instead, they have been allowed to atrophy.

Why? Because in most settings, other developments have taken much of the sting out of the strict common law rule, and consequently the tradition of aggressive judicial policing of failure of condition defenses to avoid forfeitures has gone nearly dormant.<sup>85</sup> The Willistonian project of channelling the diverse tributaries of contracts into a single mainstream<sup>86</sup> was, with most lawyers, a success: "As a general rule," our modern insurance opinions tell us, "an insurance policy should be considered as any other contract . . ."<sup>87</sup> That may seem to entail the conclusion that, absent statutory change, an express condition in an insurance policy should be treated like an express condition in any other contract.<sup>88</sup> But that isn't possible. The idea that express conditions must be literally performed has survived as a doctrinal staple of mainstream contracts chiefly because its potential for creating forfeitures has been ameliorated by the development of the doctrine of substantial performance and by the growth of off-the-contract restitutionary remedies.<sup>89</sup> In insurance, however, neither escape hatch is available. There is no room to characterize most insurance policy pro-

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85. Cf. RESTATEMENT (SECOND) OF CONTRACTS § 229 (1981): "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange."

86. See, e.g., 1 S. WILLISTON, WILLISTON ON CONTRACTS iii (1929) (emphasizing need to rescue "[t]he law of contracts" from its tendency to "fall apart").

87. Dairyland Ins. Co. v. Esterling, 205 Neb. 750, 752, 290 N.W.2d 209, 211 (1980).

88. Cf. Vold, *Express Conditions in Contracts*, 4 NEB. L. BULL. 215, 234 (1926) (early local recognition that the putative generality of "the unflinching rule, enforcing conditions of the contract according to their terms," papered over many modifications worked by statute, waiver and estoppel, and judicial construction for "exceptional cases," including especially insurance cases).

89. As one of the leading Contracts casebooks puts it:

In most respectable academic literature the idea that express conditions [must be literally performed] is introduced only to be dismissed as false or misleading. To many, if not most, practicing lawyers, however, the idea seems to commend itself as an article of faith. Counsel for insurance companies . . . have been particularly ardent believers in the sanctity of express conditions.

visions as promises rather than express conditions,<sup>90</sup> so that substantial performance arguments do not fit, and restitutionary theories requiring the defendant to disgorge unjust enrichments have virtually no application to an aleatory insurance contract in which the premium is the only value moving from insured to insurer. Consequently, in insurance the strict common law rule can operate with a strictness unmatched in most other contractual settings. In the *Fairbank* era, purposive interpretation routinely was employed to avoid the consequences prescribed by the strict rule. But warranty statutes and changes in standard policy forms have removed overly-broad warranties from the judicial agenda, and simplifications in the way postloss conditions are structured have greatly reduced the number of immaterial postloss failures of condition reaching the court. As a result, a modern lawyer stumbling across nineteenth century headnotes railing against forfeitures can be forgiven if she mistakenly assumes that in their day these quaint-sounding canons of construction were as empty and ceremonial as our own.

Certainly a lawyer reading *Fairbank*-era imprecations against forfeitures after reading the court's 1958 decision in *Farmers Mutual Hail Insurance Co. v. Leonard*<sup>91</sup> would be warranted in thinking that the tradition of purposive interpretation to avoid a forfeiture was as dead and forgotten as *Fairbank*'s cow. In *Leonard*, the court enforced a ten-day postloss notice provision in favor of an insurer with actual notice of the loss and against an insured whose attempts to comply were two days late because his son allowed the notice to ride around on a car seat before mailing it. The contrast with *Fairbank*-era decisions asking whether the defense was a "technical objection, not materially affecting the risk,"<sup>92</sup> and whether "an honest effort was made to comply with the policy,"<sup>93</sup> could not have been more striking. In *Leo-*

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F. KESSLER & G. GILMORE, *supra* note 23, at 846 (citation omitted). See also Atiyah, *Book Review*, 95 HARV. L. REV. 509, 515 (1981):

[C]ourts formerly made the mistake of assuming that all terms must be conditions and that any breach, however trivial, justified the innocent party in repudiating his own obligations. This error is now not generally followed. The innocent party retains his claim to damages but is not justified in refusing performance of his own promise. Further, many of these problem situations can be met by invoking restitutionary principles.

See generally Childres, *Conditions in the Law of Contracts*, 45 N.Y.U. L. REV. 33 (1970) (arguing that the traditional rule has become "a myth").

90. Because in the usual insurance contract only the insurer undertakes duties, terms requiring action by the insured are to be construed as conditions, not promises. RESTATEMENT (SECOND) OF CONTRACTS § 227(2) (1981). See also *General Credit Corp. v. Imperial Casualty & Indemn. Co.*, 167 Neb. 833, 95 N.W.2d 145 (1959).

91. 167 Neb. 260, 92 N.W.2d 670 (1958).

92. *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 510-11, 41 N.W. 406, 407 (1889).

93. *Id.*

nard it was clear the result matched the rule: the insurer had no liability if the insured did not strictly comply with postloss conditions, even (it was better not to say) if the insurer was not prejudiced and requiring strict compliance would work a forfeiture.

But in 1966, things changed once more. In *MFA Mutual Insurance Co. v. Sailors*,<sup>94</sup> an insured lied to the police after an accident and failed to notify his automobile liability insurer when suit was brought against him. Armed with a trial court determination that the insured's conduct "had materially and substantially breached the terms of the policy but that there was no showing of prejudice or detriment to the [insurer],"<sup>95</sup> and assured by the most standard of authorities that there was "a substantial division of authority" on the question, the court adopted the rule of "[t]he more recent cases" that "an insurer cannot assert a breach of the cooperation clause as a policy defense in the absence of a showing of prejudice or detriment to the insurer."<sup>96</sup> Why? There were no citations to *Fairbank*-era purposive interpretation decisions, but the echoes were there nonetheless:

The purpose of the cooperation clause is to prevent collusion between the injured and the insured and to facilitate the handling of claims by the insurer. Where there is no evidence of collusion between the injured and the insured and it is not shown that the insurer has been prejudiced in its handling of the claim, we think the better rule is that the breach of the policy is not a defense.<sup>97</sup>

Only months later, in *Iowa Mutual Insurance Co. v. Meckna*,<sup>98</sup> the court again applied a prejudice requirement to an insurer seeking to invoke failure of a cooperation clause. And, the court held, the insurer's defense that the insured failed to satisfy a postloss notice condition defense also must fail. This time the court did not treat the prejudice requirement as an exception to the common law rule developed in other jurisdictions and ripe for adoption in Nebraska. Instead: "What is the purpose of this provision? Patently, it is to alert the insurer to a possible claim and to afford it an opportunity to make such investigation as it deems pertinent to enable it to process any future claim."<sup>99</sup> Because the "[i]nsurer had all the information Meckna could give it, and had ample notice to permit it to take any and all necessary steps to protect its interest,"<sup>100</sup> the insurer was not entitled to a defense.

And so, it might appear, in *Sailors* and *Meckna* the Nebraska Supreme Court revived long-dormant concerns about potential abuses

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94. 180 Neb. 201, 141 N.W.2d 846 (1966).

95. *Id.* at 203, 141 N.W.2d at 848.

96. *Id.* at 204, 141 N.W.2d at 849.

97. *Id.*

98. 180 Neb. 516, 144 N.W.2d 73 (1966).

99. *Id.* at 525, 144 N.W.2d at 79.

100. *Id.* at 526, 144 N.W.2d at 80.



of provisions that seek to control juridical hazard but that are immune from the ameliorating influence of the warranty statute. In many other jurisdictions, virtually identical expressions of concern have ripened into a generalized requirement that prejudice be shown before an insurer can successfully invoke a postloss failure of condition defense.<sup>101</sup> And, repeating the pattern first established by the moral hazard condition decisions and the warranty statutes, recognition of the common theme in judicial regulation of postloss conditions has led a few jurisdictions to adopt legislation that requires a showing of prejudice before an insurer can invoke some postloss conditions as a defense.<sup>102</sup>

But not in Nebraska. Twenty-five years later, the *Sailors-Meckna* line of decisions numbers two—*Sailors* and *Meckna*.<sup>103</sup> On at least four occasions since 1966, the Nebraska Supreme Court has applied

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101. See, e.g., 3 J. APPLEMAN, INSURANCE LAW & PRACTICE §§ 1414-15 (1969); 8 J. APPLEMAN, *supra*, §§ 4741 & 4773 (1981); 13A C. COUCH, CYCLOPEDIA OF INSURANCE LAW §§ 49:50 & 49A:51 (Cum. Supp. 1989); 14 C. COUCH, *supra* § 51:107 (1982); 2 R. LONG, THE LAW OF LIABILITY INSURANCE §§ 13.05, 13.18, 14.04 (1985); Practising Law Institute, *Survey of the Law Relating to the Defense of Late Notice and Whether the Insurer Must Show Prejudice*, in INSURANCE, EXCESS & COVERAGE DISPUTES 1987 (1987); Annotation, *Modern Status of Rules Requiring Liability Insurer to Show Prejudice to Escape Liability because of Insured's Failure or Delay in Giving Notice of Accident or Claim, or in Forwarding Suit Papers*, 32 A.L.R.4th 141 (1984); 44 AM. JUR. 2d Insurance §§ 1333, 1371, 1431, 2045 (1982).

One of the most successful efforts to explain the prejudice rule is found in *Brakeman v. Potomac Ins. Co.*, 472 Pa. 66, 75, 371 A.2d 193, 197 (1977):

[A] reasonable notice clause is designed to protect the insurance company from being placed in a substantially less favorable position than it would have been in had timely notice been provided, e.g., being forced to pay a claim against which it has not had an opportunity to defend effectively. In short, the function of a notice requirement is to protect the insurance company's interests from being prejudiced. Where the insurance company's interests have not been harmed by a late notice, even in the absence of extenuating circumstances to excuse the tardiness, the reason behind the notice condition in the policy is lacking, and it follows neither logic nor fairness to relieve the insurance company of its obligations under the policy in such a situation.

102. See, e.g., WIS. STAT. ANN. § 631.81(1) (West 1980):

Provided notice or proof of loss is furnished as soon as reasonably possible and within one year after the time it was required by the policy, failure to furnish such notice or proof within the time required by the policy does not invalidate or reduce a claim unless the insurer is prejudiced thereby and it was reasonably possible to meet the time limit.

103. In *Babcock & Wilcox Co. v. Parsons Corp.*, 298 F. Supp. 898 (D. Neb. 1969), the federal district court concluded that no defense should be available for breach of a proofs of loss requirement when the insurer had received actual notice within a few days of the loss, but the court did not squarely address the prejudice issue. In *Trausch v. Knecht*, 184 Neb. 134, 165 N.W.2d 738 (1969), the court followed *Sailors* in holding that the failure to notify a liability insurer of commencement of a suit against the insured would not give the insurer a defense in the absence of prejudice, but that opinion was later withdrawn. *Trausch v. Knecht*, 184 Neb. 511, 169 N.W.2d 269 (1969).

the strict common law rule to a postloss failure of condition.<sup>104</sup> In these opinions there is no hint of the existence of *Sailors* or *Meckna*, not to mention the *Fairbank*-era decisions. And without a sense of how *Sailors* and *Meckna* fit into the history of judicial control of juridical hazard provisions, those involved in the debate over whether the Nebraska Supreme Court should extend a prejudice requirement to other postloss insurance conditions have been left without an argument. If the prevailing orthodoxy regards a policy provision as an express condition and declares that, absent statutory change, express conditions must be fully satisfied, how does one go about contending that an immaterial, technical failure of a postloss condition should not be fatal to the insured's claim? Could the proof of loss requirement be characterized as a promise, rather than a condition?<sup>105</sup> Of course not, said the court.<sup>106</sup> Could the court be convinced to change its long-standing position that the "contribute to the loss" statute does not apply to postloss conditions?<sup>107</sup> Not a chance, said the court.<sup>108</sup> Should the strict common law rule be abandoned for postloss conditions because that is the emerging trend in other jurisdictions?<sup>109</sup> Since *Sailors*, the court has not even acknowledged the existence of that trend.

And so, once again, how one understands the story depends on the perspective one brings to the effort. Seen as part of a half-century's judicial treatment of postloss conditions in Nebraska, *Sailors* and *Meckna* are aberrational departures from the otherwise consistent ap-

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104. First Sec. Sav. v. Aetna Casualty & Sur. Co., 233 Neb. 335, 445 N.W.2d 596 (1989); First Sec. Bank & Trust Co. v. New Hampshire Ins. Co., 232 Neb. 493, 441 N.W.2d 188 (1989); Dockendorf v. Orner, 206 Neb. 456, 293 N.W.2d 395 (1980); Ach v. Farmers Mut. Ins. Co., 191 Neb. 407, 215 N.W.2d 518 (1974).
  105. Brief of Appellant at 34-35, First Sec. Bank & Trust Co. v. New Hampshire Ins. Co., 232 Neb. 493, 441 N.W.2d 188 (1989) (No. 87-897). There was some faint reason to hope; in Northern Assurance Co. v. Hanna, 60 Neb. 29, 82 N.W. 97 (1900), the court seized on the absence of specific language of forfeiture in a proof of loss provision as support for characterizing it as something other than a strict condition, and the heresy was repeated in Keene Coop. Grain & Supply Co. v. Farmers Union Indus. Mut. Ins. Co., 177 Neb. 287, 128 N.W.2d 773 (1964). Of course, both *Hanna* and *Keene* are inconsistent with the rest of the Nebraska law of insurance, which routinely characterizes such provisions as express conditions.
  106. First Sec. Bank & Trust Co. v. New Hampshire Ins. Co., 232 Neb. 493, 505, 441 N.W.2d 188, 196 (1989).
  107. Brief of Appellant at 26-34, First Sec. Bank & Trust Co. v. New Hampshire Ins. Co., 232 Neb. 493, 441 N.W.2d 188 (1989) (No. 89-176); Brief of Appellant 27-36, First Sec. Sav. v. Aetna Casualty & Sur. Co., 233 Neb. 335, 445 N.W.2d 596 (1989) (No. 87-897).
  108. First Sec. Bank & Trust Co. v. New Hampshire Ins. Co., 232 Neb. 493, 505-06, 441 N.W.2d 188, 196 (1989).
  109. Brief of Appellant at 16-26, 37-48, First Sec. Bank & Trust Co. v. New Hampshire Ins. Co., 232 Neb. 493, 441 N.W.2d 188 (1989) (No. 89-176); Brief of Appellant 18-27, 39-50, First Sec. Sav. v. Aetna Casualty & Sur. Co., 233 Neb. 335, 445 N.W.2d 596 (1989) (No. 87-897).

plication of the strict common law rule. But viewed in the full sweep of a history extending over more than a century, it is the current Nebraska law of postloss conditions, not *Sailors* or *Meckna* or the *Fairbank*-era decisions, that needs explaining.

#### IV. CONCLUSION

The primary lesson to be drawn from this brief retrospective is the obvious one: an appreciation of the role and dangers of juridical hazard provisions in standard insurance policy forms can be a powerful tool for explaining insurance law decisions—both old and new—that apply a prejudice rule to some postloss conditions, and for guiding application of that rule. In Nebraska, recognition of that lesson should be an important first step toward correcting the anomalies in the Nebraska Supreme Court's current treatment of postloss conditions. Elsewhere, it should provide guidance for the resolution of continuing uncertainties about which postloss conditions should be subjected to a prejudice standard,<sup>110</sup> and should stimulate thought about how to con-

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110. Simply put, a prejudice requirement for postloss conditions makes sense only for those provisions that are there to protect the insurer against juridical hazards in the claims adjustment process; to the extent that a postloss condition plays a different role, it should be immune from a prejudice requirement.

Should the prejudice rule apply to suit conditions, like that encountered in *Fairbank*? Most jurisdictions that have adopted a prejudice requirement for postloss loss adjustment conditions do not apply it to suit conditions. Why not? Because, like the *Fairbank* court, they ascribe to the suit provision functions that go beyond simply protecting the insurer from juridical hazard. As one court put the distinction:

A failure to abide by the limitation of action condition in a policy stands on a much different footing than a non-compliance with the notice provisions . . . . [T]he main purpose underlying the notice stipulations is to safeguard the insurer from prejudice in processing a claim. Therefore, where an insurer's interests have not been harmed by a late notice, the reason for the notice condition is lacking. By contrast, limitation periods on suits are designed to promote justice by preventing surprises through revival of stale claims, to protect defendants and courts from handling matters in which the search for truth may be impaired by loss of evidence, to encourage plaintiffs to use reasonable and proper diligence in enforcing their rights, and to prevent fraud. The presence or absence of prejudice is not, nor should it be, a factor in deciding whether an insurer may effectively assert this defense under the policy.

*Zieba v. Middlesex Mut. Assurance Co.*, 549 F. Supp. 1318, 1321 (D. Conn. 1982)(citations omitted). See also *Brandywine One Hundred Corp. v. Hartford Fire Ins. Co.*, 405 F. Supp. 147, 151 (D. Del. 1975)(stating "[T]he purpose of the [notice provision] is to avoid prejudice; the [suit limitation provision] is simply a contractual modification of the statute of limitations.").

Should the prejudice rule be applicable to notice provisions in claims made liability insurance policies? The question is not yet settled, in large part because the legitimacy of the fundamental shift of risk from insurer to insured worked by the change from occurrence to claims made formats is still being contested. In that setting, reaching agreement on how to ascribe a purpose to the notice re-

struct a prejudice standard with a more nuanced allocation of the costs of juridical hazard.<sup>111</sup> And everywhere recognition that the prejudice rule is grounded in an instinct to regulate the discretion juridical hazard provisions confer may prove useful for explaining other insurance policy provisions that historically have seemed likely to attract judicial lightning.<sup>112</sup>

But there is a broader lesson to be learned as well. The effort to locate *Fairbank* within a history that ranges from *Lippold* through *Leonard* and *Sailors* and *Meckna* to the *First Security* decisions should remind us that one need not be in the front ranks of intellectual jousting over the possibilities of determinacy in the reading of legal texts to be engaged in work that can be enriched by a little self-

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quirement has been impossible. See generally Business Insurance, July 30, 1990, at 1, col. 1; Business Insurance, Aug. 31, 1987, at 1, col. 1. For a collection of authorities, and views from both sides, compare Anderson, *Current Issues in Claims-Made Insurance Policies*, 14 ALI-ABA COURSE MATERIALS J. 57 (1989) with Kaiman & Nachison, *Courts in the Business of Insurance: Claims Made and Reported Policies*, 57 DEF. COUNS. J. 43 (1990).

111. Recognizing that some broadly drafted policy conditions are efforts to economize on the costs associated with juridical hazards does not mean that they should be blindly enforced, but neither does it mean that the insurer necessarily should bear all the burdens of that juridical hazard. A creative allocation of the burdens of proof and the use of presumptions might well curtail unacceptable opportunism without forcing the insurer to bear all of the costs of juridical uncertainties. See, e.g., *Tiedtke v. Fidelity & Casualty Co.*, 222 So. 2d 206 (Fla. 1969) (insurer denied failure of notice condition defense if insured can demonstrate insurer not prejudiced); *Zurich Ins. Co. v. Valley Steel Erectors, Inc.*, 13 Ohio App. 2d 41, 233 N.E.2d 597 (1968) (insurer enjoys rebuttable presumption that it was prejudiced by delay). See also Goetz, *Contractual Remedies and the Normative Acceptability of State-Imposed Coercion*, 4 CATO J. 975 (1985) (emphasizing need for tradeoffs between process values and substantive results); Note, *Common-Law Due Process Rights in the Law of Contracts*, 66 TEX. L. REV. 1021 (1988) (urging public-law analysis of problems of discretion in performance of contracts).
112. "Evidentiary conditions"—provisions that require that there be some specified evidence concerning the cause of loss—are prime candidates for this treatment. For example, accidental dismemberment policies conditioning liability on proof that the loss of limb occurred within ninety days after the injury accident respond to legitimate insurer concerns about the difficulties of establishing causal responsibility for a loss, but can operate in a way that triggers the same disquiet that prompted enactment of the warranty statutes. A leg injured in an accident may not be amputated until more than ninety days have elapsed because doctors used heroic but ultimately unsuccessful measures to save the leg; there has been a failure of condition, but there is no doubt that the accident caused the loss of the leg. But, of course, warranty statutes do not apply to evidentiary conditions. See generally R. WORKS, *supra* note 22, at 129-132; Holmes, *Interpreting an Insurance Policy in Georgia: The Problem of the Evidentiary Condition*, 12 GA. L. REV. 783 (1978).

Doubtless, too, the harsh treatment accorded approval style binding receipts through the years might be usefully viewed through this lens. See generally *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599 (2d Cir. 1947); R. KEETON, *supra* note 64, § 2.3, at 36; E. PATTERSON, *supra* note 70, § 20, at 100-01.

consciousness about interpretive strategies. The strict common law rule is strict, it turns out, only if we indulge the positivist conceit that determination of a policy provision's meaning must be kept divorced from a determination of its legal effect. And the "prejudice rule," it turns out, is less a rule than an interpretive technique, a way of trying to make a policy provision's message no more than is necessary to reflect the insurer's reasons for putting it there. In the *Fairbank* era the selfconscious search for a functional interpretation of policy language that would accomplish the insurer's purpose but deny the insurer a defense where the failure of condition did not prejudice the insurer was a fact of insurance life, reflected not only in the substantive results being reached but also in the generalized warnings against forfeitures enshrined in the court's syllabi, in the insurance treatises, and eventually in the warranty statutes. Today things are much different. Today's headnotes counsel that policy language be understood as a hypothetical policyholder would understand it, and that any ambiguities be construed against the insurer, thus shifting the focus away from an effort to determine the real reasons the provision is in the policy to an effort to imagine what the provision might be made to mean to an imaginary policyholder should he chance to read it. In such a setting, the strict common law rule can flourish. And that's a shame. We used to do much better.